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No. 92-1544

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

PACIFIC LEGAL FOUNDATION,
Petitioner,

VS.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN MCCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In Propria Persona

Questions Presented

1. Whether the district court, in the exercise of its inherent powers, may impose a limited monetary sanction against the entity (the "public interest law firm") employing all of the attorneys, where the sanctionable matter permeated years of litigation, and where the court expressly found, *inter alia*, that the entity

(a) had "circulated no fewer than eleven attorneys through the case, none appearing or withdrawing by formal leave of court,"

(b) had "actively participated in all phases of the case"

(c) had been "the sponsor of th[e] litigation;"

(d) had represented itself "as counsel" exercising "quality control" in litigation,

(e) had been "one of the intended beneficiaries of the offending conduct," and

(f) where the court further found that "in the circumstances of this case" imposing such inherent powers sanctions directly upon the entity was necessary to the operations of the court.

2. Whether a district court, which found that the imposition of sanctions directly upon the entity employing the attorneys was necessary to the court's operations, has "jurisdiction" over the entity sufficient to sanction it, where, *inter alia*,

(a) the entity was expressly found to have "actively participated in all phases of the [underlying] case;"

(b) the entity's attorney employees signed stipulations filed in court expressly in the name of the entity during the underlying litigation;

(c) the entity's name and logo were prominently displayed on virtually every sheet of paper filed in court by the entity's attorney employees during the underlying litigation;

(d) the entity's out of court statements to a party, to the counsel for other parties, and to the public claimed that the entity had filed the suit; and

(e) the entity appeared and participated in the sanctions proceedings, was expressly represented by counsel for the entity, and the entity's opposition papers filed during 1988 and 1989 did not even contain the word "jurisdiction" and the entity did not raise "jurisdiction" as an objection at any time prior to the Special Master's final liability report in 1990, which expressly confirmed that the entity (and not its clients) should be sanctioned.

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STATEMENT OF THE CASE

1. *Background.* These sanctions arose out of litigation filed by the Pacific Legal Foundation ("PLF") in 1982 against Bolinas Community Public Utility District ("BCPUD"), a small semi-rural district, and against numerous present and former directors and private citizens who had participated in civic affairs. Clerk's Record (hereinafter "CR") 1. The complaint included a plethora of purported antitrust and constitutional claims, which the Court quickly recognized "were supported by little more than overbroad, legally conclusory allegations that fail[ed] to adequately identify their legal or factual bases." *See, e.g.*, C-20-22.[1] The damages sought -- more than $30 million plus attorneys' fees (over 100 times the operating budget of BCPUD) -- were also sought personally from the individual defendants, who were sued in their personal capacities (as well as any official capacity they might have or they might ever have had during a period extending back more than a decade). CR 1; C-17, C-34.

Recognizing early that the mere pendency of the litigation could have a potentially chilling impact on defendants' exercise of their First Amendment rights, the District Court directed that certain information be provided in an amended complaint. C-20-22. Despite the District Court's order, and despite its other warnings and expressions of concern regarding the potentially chilling impact of this type of litigation, the additional information was not provided. C-26.

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[1] Petitioner's Appendix "C". Citations to Petitioner's Appendices "A" through "M" will be in this form, as will citations to Respondent's Appendices "N" through "S" (which are at the end of this opposition).

Instead, the amended complaint expanded the number of vague claims and added still more parties. After reviewing the circumstances of this case, the Special Master concluded during the sanctions proceedings, as did the District Court Judge, that this refusal to comply with the Court's order had been in bad faith.

It was but one of several specific situations involving bad faith litigation conduct where PLF had

> attempted to contort what could have been a relatively straightforward case into a massive, complex, conceptually dense, expensive litigation, and, along the way, persisted in pursuing theories . . . for which there was no credible factual support.

E-9.

2. *Bolinas Community Public Utility District ("BCPUD").* BCPUD is a small public utility district in western Marin County. Formed in 1967, BCPUD operates a water system inherited from two even smaller districts; it provides water services to approximately 580 water meter connections. In 1977 BCPUD enacted a moratorium on water hookups to its systems, which was in effect when this action was filed. (Previous moratorium resolutions, enacted in 1971 and 1973, were repealed in 1977. CR 384, Exh. A.) In 1982 the California Department of Health Services ("DOHS") expressly conditioned BCPUD's operating permit on a continuation of the BCPUD moratorium on new hookups, although BCPUD had made significant improvements to the system. *See* CR 350, Exh. D (DOHS Engineering Rptr., Aug. 1982) ("Due to the limited storage capacity and the many leaks in the aged distribution system, it is not possible for the system to support additional connections at this time."). The DOHS imposed this condition on BCPUD's

operating permit prior to the filing of this litigation. The DOHS condition has been upheld by the state courts in other PLF litigation involving the parties herein, *see Gilbert v. State of California*, 218 Cal. App. 3d 234 (1990), as has the BCPUD moratorium, which the state court found to have been "justified from its inception". *Gilbert et al. v. State of California et al.*, No. 636481-0 (Nov. 22, 1991).[2]

3. *The Individual Respondents*. The nine individual respondents include three current BCPUD board members (Kayfetz, Amoroso and McClellan) and six former board members (Niman, Schell, Harris, Weston, LeMieux and Farnsworth). They were among the more than twenty individual defendants who were sued personally for more than $30 million in this litigation. Several respondents, unable to secure representation, appeared *in propria persona* during parts of the litigation.

4. *Petitioner Pacific Legal Foundation ("PLF")*. PLF generally describes itself to the federal and state governments, the legal community and the public as a "public

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[2] The final state court decision upholding the BCPUD moratorium concluded that (a) "there is a solid factual basis for declaring a water shortage emergency" and (b) "the moratorium has been justified from its inception to the present based upon realistic concerns . . . about the capacity of the District's water system to meet conservative demands in times of continuing drought, particularly given the marginal capacity not only of the storage system, but the delivery system, as well." R-1-4. Ignoring the final, binding decision about the moratorium, the petition points to an earlier preliminary decision of the Ninth Circuit which reversed part of an earlier summary judgment as to certain claims, *none of which affected the bases of the District Court's sanctions*. Moreover, the Ninth Circuit's decision "at this preliminary stage" reflected an express preference for "[r]esolution by plenary hearing rather than by summary judgment . . . [in] claims for regulatory taking." H-8-9.

interest law firm." *See, e.g.*, C-35; O-3-7, 10; *and* CR 537, Exhs. A, B, D. It claims to be the largest law firm of its type in the country. O-3-7, 10; CR 500, Exhs. I, J; see also Q-3, ¶2 (PLF revenues during this litigation). The PLF's President, CEO and Board Member (and the senior PLF attorney in this litigation) has said of this case: "The PLF filed suit" against BCPUD. The case was "brought by the PLF." It was "[o]ne of the most significant PLF law suits." "This case will be an extremely important one for PLF." C-33-34. It was, he said, "The case we have been waiting for." O-6-7; CR 536, Exh. C. The District Court found that "PLF has circulated no fewer than eleven attorneys through this case." C-34. The PLF's CEO was also joined on this case by the PLF's Deputy Director and a PLF Section Chief. *See* CR 500, Exhs. G, I, J; CR 1 & CR 168; CR 249; *and* CR 607, Tab 40. "Plaintiffs have been represented throughout this action only by PLF attorneys." C-34, ¶39. "PLF was . . . actively involved in all phases of the case." C-33. ¶36.

5. *PLF's Clients.*[3] PLF's clients in this litigation were real estate developers, Anton Holter and Mesa Ranch (his partnership) and the Lockarys, Gilberts and Macey. Holter/Mesa Ranch owned 210 acres. All was outside BCPUD boundaries, except one acre with a water meter. Contrary to the petition's suggestion (Pet 3), Holter/Mesa Ranch were <u>not</u> seeking a water hookup; Holter already had one and was receiving water from BCPUD. *See* C-14-15, ¶ 5. The other plaintiffs owned small, unimproved lots within BCPUD's boundaries without water meters. The Lockarys and Macey bought their land just before the litigation with

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[3] The PLF refers to a person represented by PLF attorneys as a "client" of the entity. C-35, ¶ 40.

full awareness of the existing moratorium. C-14, & C-26.[4]

6. *The Sanctions Proceedings.* BCPUD and the individual defendants filed motions for sanctions and attorneys' fees in February 1988. CR 472, CR 480-503. The District Court Judge directed that the motion be referred initially to a special master. CR 528. United States Magistrate Judge Wayne D. Brazil, an agreed-upon candidate, acted as Special Master. CR 543.

Additional briefing of sanctions issues for the Special Master was completed in early March 1989. At a conference on March 14, 1989, the Special Master noted shortcomings in the responses and submissions of PLF and the plaintiffs; he then provided them yet another opportunity to file papers. Leaving the choice up to them, he also offered the opportunity to present testimony through affidavits, or live at an evidentiary hearing (an option they declined). At the March 14 conference, the Special Master prompted *sua sponte* a special discussion of the First Amendment. He also provided a separate briefing opportunity to address specifically "what, if any, significance arises in the context of these proceedings due to the nature of PLF as a non-profit, public interest law firm." CR 599, ¶ 4. PLF filed a brief on this issue (CR 616), to which defendants responded. CR 631-32.

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[4] Contrary to the petition's suggestion (Pet 2), plaintiffs were not simply "parties who could not otherwise afford to present their claims in court." The developer plaintiffs (Holter/Mesa Ranch) used private counsel when suing the United States, an adversary far more formidable than tiny BCPUD, in contemporaneous litigation for taking the same property. *See, e.g.*, 222 Ct. Cl. 623 (1980) & 2 Cl. Ct. 700 (1983).

A draft recommendation was filed by the Special Master in early September 1989. CR 634. After receiving comments from BCPUD, PLF and Holter/Mesa Ranch, the Special Master filed a Report and Recommendation re: Liability Aspects of Defendants Motions for Sanctions on January 11, 1990. C-1-106. The 103-page report contained detailed findings, including multiple findings of bad faith, as well as a finding that PLF had "abundant" notice of the sanctions risk from the beginning, that PLF had "actively participated in all aspects of the case," and that "in every meaningful sense of the word, PLF shared responsibility for the bad faith actions." The report also found that the District Court needed and possessed the inherent powers authority to sanction the PLF itself, and, with respect to certain identified matters, but not others, it recommended that sanctions be imposed on the PLF.

PLF filed objections on January 29. CR 648. A review followed by the District Court Judge, who had handled the underlying action since its filing in 1982. On April 2, the Court adopted the findings of fact and conclusions of law and accepted the recommendations in the Special Master's report. S-1-2. The Court additionally found that the "circumstances of this case clearly support" the imposition of monetary sanctions on PLF.

Following the District Court's April 2 order, the Special Master conducted further proceedings to determine the amount of the sanctions. On January 28, 1991, the Special Master issued his Recommendation re Character and Magnitude of Sanctions. E-1-105. The report further addressed considerations that shaped the sanctions recommendation, general mechanics of the calculations, and

specific calculations for each defendant. Id.[5] PLF filed objections. CR 741. On February 11, 1991 the District Court adopted the Special Master's recommendations and awarded the sanctions. CR 743. On September 9, 1992, the Ninth Circuit affirmed in part and reversed in part the sanctions award. A-1-32.

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[5] The Special Master's January 11, 1990, report had also recommended additional show cause proceedings with respect to potential personal liability of certain individual PLF attorneys for sanctions, and the District Court's April 2 order accepted the recommendation. Pursuant to the briefing schedule established at the June 21 conference, briefs for the individual PLF attorneys were filed on July 23 (CR 671 & CR 674), with responses and replies on August 17 (CR 688-89 & CR 692-93) and August 30 and 31 (CR 694-702). On October 22, the Special Master recommended that the proceedings regarding the amount of the PLF sanctions continue but that those regarding personal sanctions awards be terminated. CR 710. Despite believing that he could proceed with "an open, persuadable mind" in considering personal sanctions awards against individual PLF attorneys, the Special Master observed that the way the findings had been articulated in the January 1990 liability report might suggest otherwise. The Court accepted the Special Master's recommendation, noting expressly that (i) "the expenditure of time and effort to further adjudicate these issues is not outweighed by any benefit that might accrue from the continued adjudication" (ii) *the proceedings may already "have given counsel an opportunity to reflect upon their conduct in this case" which "may be helpful to counsel in their future practice"* and (iii) the Special Master was to be commended "for the thorough and fair assessment of the sanctions issues." CR 711 (emphasis supplied).

I. The Petition's First Question Is Not Raised By The Decisions Below: Imposing Sanctions Directly On The PLF Was Expressly Found To Be Necessary Under The Particular Circumstances Of This Case

The Petition notes that inherent power sanctions may not be imposed "absent a determination that the exercise of such power is necessary to the courts' operation" (Pet 8) but then states, inaccurately, that no court here found that the imposition of sanctions was "necessary to protect the district court's authority." Pet 11.

The District Court herein was keenly aware of the care, caution and restraint appropriate to the exercise of its inherent powers. *See, e.g.*, C-36-38; E-2-12; *see also* CR 634 at 60-62. Sanctions were imposed only after a District Court Judge, intimately familiar with the litigation since its filing in 1982, and an agreed-upon Special Master, previously unfamiliar with the litigation, *each* found that sanctions were appropriate and that imposing those sanctions upon the PLF was both appropriate and necessary under the particular circumstances of this litigation.[6]

Necessity was directly addressed and ruled on by the District Court. For example, the court found:

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[6] The PLF "appeared before the district court to defend against the sanctions motions" (Pet 13) and had a full opportunity to respond to them. *See, e.g.*, CR 599 (Special Master *sua sponte* (a) provided PLF and others a third opportunity to submit additional evidence in response to sanctions motions, (b) requested briefing whether PLF's status as public interest law firm raised any special First Amendment issues, and (c) provided the PLF an opportunity to review and comment on an initial draft report.)

In the circumstances of this case, which we describe in detail *infra*, we feel that the District Court **must have** the authority to impose sanctions on PLF itself if the Court is **to be able to protect itself from misuse**, to **protect the interests of litigants** who proceed in good faith, and to **protect the viability of the rules of procedure** that Congress and the Supreme Court have adopted. In every meaningful sense of the word, PLF shared responsibility for the bad faith actions that we describe below. As we show in subsequent sections, PLF was the source, the sponsor, and one of the intended beneficiaries of the offending conduct. There is no reason to believe that PLF did not know how this litigation was being handled, or that PLF was a mere passive and abstract institutional backdrop against which an individual attorney acted independently. Instead, PLF's principal officers formally associated themselves with and publicly claimed credit for the pleadings and other papers that we have concluded were filed in bad faith. Moreover, **because PLF circulated at least 11 different attorneys through this case** (without ever seeking permission for any attorney to join or to withdraw as counsel of record), **it would be impossible for the District Court to meaningfully enforce the norms** that Congress and the Supreme Court have established **if the Court could not impose liability for offending those norms on PLF itself.** These norms carry **a promise of procedural fairness that the courts could not fulfill if they could not impose sanctions on an entity like PLF in circumstances like those** described in the pages that follow. Thus we recommend that, relying on its inherent authority, the Court impose sanctions on PLF.

C-8-9 (Emphasis supplied.); *see* S-1-2 (District Court adoption of findings). These findings of necessity were well-supported by the record.[7]

Moreover, Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") and 28 U.S.C. § 1927 ("Section 1927"), to the extent applicable to the individual PLF attorneys, were expressly considered, and proceedings were undertaken to employ them. *See, e.g.*, C-9-10, C-105-106, E-1-2. Considerations of overall fairness, not lack of culpability, resulted in those proceedings terminating without individual monetary sanctions awards. *See, e.g.*, F-1-2 & note 5, *supra; see also* A-9, n1. Although that process did not result in monetary sanctions being imposed separately on individual PLF attorneys, the PLF has no cause to complain.[8] Under the particular circumstances of this

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[7] *See e.g.* C-60-61 & n.25 (an example of bad faith conduct extending "throughout the course of this litigation"; six attorneys identified on the papers; "difficult .. to point to the specific PLF attorneys responsible"), C-92-95 (continued impact of "no meaningful effort to comply with Judge Williams' order") & F-1-2 (district court order: sanctions proceedings attempting to allocate responsibility among individual PLF attorneys terminated; "continuation ... may harm individual attorneys not at fault, and the expenditure of time and effort to further adjudicate these issues is not outweighed by any benefit that might accrue from the continued adjudication"; "past process ... [has] given counsel an opportunity to reflect upon their conduct in this case and highlighted improper behavior ... and may be helpful to counsel in their future practice"; "PLF sanctions proceedings not terminated.")

[8] Significantly, PLF did not object at any time to termination of the sanctions proceedings against the individual PLF attorney employees, and it did not appeal the District Court's decision to terminate those proceedings. *See* note 5, *sopra*. If anyone had cause to complain, it would have been the defendants. *See, e.g.*, A-9, n1.

litigation, Rule 11 and Section 1927 were found to be inadequate to protect the Court "from misuse," "the interests of litigants" and "the viability of the rules of procedure." Fulfilling the "promise of procedural fairness" required use of the court's inherent powers.

The petition's first question assumes "*the absence* of any determination" that invocation of the court's inherent powers was necessary. Such a determination was made. Thus, the first question is not presented, and the petition should be denied.

II. There Is No Conflict Between The Fourth Circuit's Decision In *Blue* And The Decision Herein.

The petition claims that the decision herein is in "conflict with the decision of the Fourth Circuit in *Blue v. Department of the Army*, 914 F.2d 525 (4th Cir. 1990)." Pet 12. In attempting to manufacture a conflict, the petition has ignored both the facts of *Blue* and the facts herein. No such conflict exists, as a brief comparison of the two cases readily confirms. For example:

Moreover, as the corporate employer, PLF remained free to explore indemnification, if indemnification was appropriate. *See, e.g.*, Cal. Labor Code §§ 2802, 2865, Cal. Corp. Code § 5238. *See, also, Continued Casualty Co. v. Phoenix Construction Co.*, 46 Cal. 2d 423, 428 296 P. 2d 801 (1956) (An employer who has been held liable for the unauthorized negligent act of his employee may recoup his loss in an action against the employee), *and* Restatement (Second) of Torts § 886B, p. 344 (1977). The PLF's current objections are simply another attempt to secure practical immunity for the sanctionable conduct.

1. *Unlike Blue, no preclusive order was entered herein.* In *Blue*, the District Court's sanctions order prohibited the NAACP Legal Defense Fund (LDF) from paying the sanctions imposed on an attorney. The order there was clearly *preclusive*. No preclusive order was entered herein; the sanctions were imposed on the entity without any effort to restrict its financial sources or to preclude internal allocations of responsibility within the organization. Moreover, the record below demonstrates appropriate sensitivity to such issues. *See, e.g.*, CR 565 (BCPUD suggested that, if desired by PLF, any sanctions order could expressly preserve any rights to contribution that PLF might have.). The absence of a preclusive order is but one fatal flaw in the claimed conflict.

2. *Unlike Blue, the sanctionable actions herein occurred while the attorneys were employed by the PLF acting as employees of the PLF.* The situation was very different in *Blue*. One of the attorneys sanctioned (Chambers) happened to be employed by LDF *when the sanctions were imposed*, and he was sanctioned for conduct *unrelated* to his LDF employment. The sanctionable conduct was related to his private law practice. *See Blue, supra* at 531-32.[9] In *Blue* the sanctionable litigation had been

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[9] The pre-filing investigation by Chambers' private law firm began in the spring of 1980. The action was filed in September 1981. The junior associate, Sumter, joined the law firm in January 1983, and trial began January 1984. With Sumter acting as counsel, Blue abandoned numerous claims. The U.S. Army moved for sanctions regarding the "abandoned claims," and the "remainder of Blue's claims went to trial in April 1984." In 1987 the court "awarded sanctions based on the abandoned claims". The "claims which Blue ... had dropped were frivolous, ... both plaintiffs and their counsel had either entered into or maintained the baseless litigation in bad faith." The sanctions for the bad faith pursuit of the frivolous claims, which were dropped in April 1984, were unrelated to LDF, because,

investigated, filed and handled by attorneys at the private law firm acting as such, and Chambers was sanctioned in his private law firm role. *Id.* at 546 ("as an experienced senior partner in charge of the case from its outset"). The PLF's relationship herein stands in sharp contrast to the LDF's in *Blue*. "PLF circulated no fewer than eleven attorneys through this case," and the plaintiffs were "represented throughout ... only by PLF attorneys." C-34, ¶ 39.

3. *Unlike Blue, the PLF sponsored and financed the litigation herein and did so from the outset.* Nothing in *Blue* supports the petition's suggestion that the LDF "financed the litigation" (*see* Pet 12) or that the Fourth Circuit's opinion creates a conflict over a district court's "authority to make distributional judgments as between attorneys and non-parties who fund their litigation activities." Pet 13. In addition to there being no such preclusive order here, the precluded entity in *Blue* had not financed the litigation in which the sanctionable conduct occurred. Sanctions must be adapted to the circumstances of the case. *Blue* and *PLF* are materially different. Here, PLF was the "sponsor of the litigation," "was actively involved in all phases of the case," and represented that it "exercises 'quality control' in litigation." Its president, the senior PLF attorney on the case, asserted not only that "[t]he PLF filed suit," but also that this "PLF suit ...[would be] an extremely important one for PLF". *See* C-33-35.

No conflict exists between the decision herein and the Fourth Circuit's decision in *Blue*. If anything, *Blue* provides additional support for denying the petition. *See III.7.*

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inter alia, it was not until "July 1984" that Chambers assumed his position at LDF. *Id.* at 532.

III. The Imposition of Sanctions On The PLF Was Neither Novel, Unprecedented, Nor Inappropriate.

During sanctions proceedings, the PLF itself appeared, was represented by counsel and enjoyed multiple opportunities to present evidence after knowing that defendants had requested that, *inter alia*, sanctions should be imposed on the PLF itself. The factual findings adopted by the District Court by its April 2, 1990, order included: (i) PLF circulated eleven attorneys through the case (C-9); (ii) "deliberate" bad faith conduct "extended throughout the course of the litigation" including instances where more than half the PLF attorneys were involved (C-60 & C-56-61); (iii) PLF was "the source, sponsor and one of the intended beneficiaries of the offending conduct" (C-8); (iv) PLF shared responsibility "in every meaningful sense of the word," (C-8) and (v) express findings of necessity that, under the circumstances of this case, the District Court "must have the authority to impose sanctions on the PLF itself" to protect the "court from misuse," to protect the "viability of the rules of procedures," and to "protect litigants who proceed in good faith". C-8.

These factual findings, and the extensive record supporting them, show that imposing sanctions upon the PLF itself was appropriate under the circumstances of this litigation. It is important, however, to appreciate that holding such an entity responsible for the acts of its employees is not novel, and the decision to do so presents no new policy issue or significant question requiring this Court's attention.

1. *California charitable corporations are regularly held responsible for the acts of their employees.* PLF is a California non-profit corporation. Such organizations are regularly held accountable for the misconduct of the entity

and of the entity's employees or other agents. PLF has no reasonable basis for expecting the sanctions immunity which it continues to seek.[10]

2. *Congress has expressly recognized the propriety and wisdom of imposing sanctions directly upon a pro bono legal services organization.* The petition suggests that holding the PLF responsible is both novel and bad policy. It is not, as Congress itself has already recognized. *See, e.g.*, 42 U.S.C. § 2996e (f) (Legal Services Corporation: Costs

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[10] *See, e.g., Malloy v. Fong*, 37 Cal.2d 356, 232 P.2d 241, 247 (1951) ("'The incorporated charity should respond to private individuals, business corporations and others, when it does good in a wrong way.'"); *Rice v. California Lutheran Hospital*, 27 Cal. 2d 296, 163 P.2d 860 (1945) (non-profit hospital liable for professional employee's negligence); *Miller v. International Church*, 225 Cal. App. 2d 243, 37 Cal. Rptr. 309 (1964) (church held liable for negligence of minister); *Vind v. Asamblea Apostolica De La Fe En Christo Jesus*, 148 Cal. App. 2d 597, 307 P.2d 85 (1957) (church liable for employee's negligence); *Phoenix Assur. Co. v. Salvation Army*, 83 Cal. App. 455, 461-62 256 P. 1106 (1927) (rejected immunity because it would cause "the agents of charitable institutions to render less than due care"); *Valentine v. La Societe Francaise De Bienfaisance Mutuelle De Los Angeles*, 76 Cal. App. 2d 1, 172 P.2d 359 (1946) (hospital liable for employees' negligence); *see also Allard v. Church of Scientology*, 58 Cal. App. 3d 439, 129 Cal.Rptr. 797 (1976) (church liable for both punitive damages and compensatory damages caused by church employee's statements; "egregious case of malicious prosecution subjects the judicial system itself to abuse, thereby interfering with the constitutional rights of all litigants") and *Silva v. Providence Hospital of Oakland*, 14 Cal. 2d 762, 97 P.2d 798 (1939) ("To require an injured individual to forego compensation for harm when he is otherwise entitled thereto, because the injury was committed by the servants of a charity, is to require him to make an unreasonable contribution to the charity, against his will, and a rule of law imposing such burdens cannot be regarded as socially desirable nor consistent with sound policy").

and fees imposed in action commenced or pursued for harassment purpose or involving abuse of legal process "shall be paid by the Corporation.") California has also recognized that holding charitable corporations responsible financially is good public policy. *See, e.g., supra,* note 10.

3. *The Federal tax exemption policy regarding tax-exempt law firms like PLF neither condones nor immunizes abusive litigation tactics.* In both courts below, the PLF asserted its tax-exempt status as if it somehow should confer upon the PLF some immunity from court-awarded sanctions. It does not. If anything, the PLF's tax-exempt status imposes upon it additional obligations to ensure that litigation abuse does not occur. *See, e.g.*, Rev. Proc. 71-39, 1971 C.B. 565 (Requirement: The organization does not attempt to achieve its objectives through a program of disruption of the judicial system, illegal activity, or violation of the applicable canons of ethics.)

4. *PLF itself, not the individual PLF attorneys, would have received any attorneys' fees awarded in this litigation.* This litigation was authorized by the PLF. The complaints expressly sought attorneys' fees. *See, e.g.*, CR 1, (complaint sought statutorily authorized attorneys' fees.). The attorneys' fees, however, could not properly have gone to the individual attorneys. *See* Rev. Proc. 75-13, 1975 C.B. 662 (attorneys' fees received by public interest law firms go "to the organization rather than to individual staff attorneys."); *see also* CR 500 (IRS Form 990, Part IV, schedule 7: PLF's receipt of "court-awarded attorneys' fees"). Since the PLF was the potential beneficiary of any attorneys' fees awarded, equity also supports imposition on the PLF of the modest sanction which partially reimbursed defendants for some of the additional attorneys' fee burdens caused by the sanctionable conduct.

5. *The imposition of sanctions upon a tax-exempt public interest law firm has already been reviewed and approved by the Eleventh Circuit.* The Ninth Circuit's decision approving the imposition of sanctions upon the PLF was not the first circuit court to approve a sanctions award against a tax-exempt, public interest law firm. *See* A-14 ("We agree with the Eleventh Circuit that '[s]tatus as a public interest law firm or the nature of a claim does not confer immunity from attorneys' fees for bringing and maintaining frivolous lawsuits.") In *Avirgan v. Hull,* 932 F.2d 1572, 1582-83 (11th Cir. 1991), *cert. denied,* 112 S.Ct. 913 (1992) a sanction of more than $1 million was affirmed. The sanction herein was modest and only a small fraction of PLF revenues. *See also* Q-3 (PLF revenues exceeded $25 million from the filing of the complaint to sanctions determination) & CR 500, Exh. A; N-3 (BCPUD's entire annual operating budget when sued herein for $30 million was approximately $280 thousand).

6. *The sanctions herein do not require any impermissible "interference."* The petition's "interference" point is a red herring. First, the PLF has long touted itself as exercising "'quality control' in litigation." C-35, ¶40 (finding); C-61 ("self professed 'quality control' monitor over the litigation"); *see also* CR 676, ¶¶ 9-11. Second, no evidence offered by the PLF even suggested that the PLF's management wanted the PLF attorney employees to behave differently but were afraid to "interfere." Third, the PLF management had actual control all along, so no "interference" was needed. Throughout the litigation, the PLF's CEO, a PLF Board Member, was the senior attorney of record, aided herein by the PLF's Deputy Director and a

PLF Section Chief.[11] Fourth, as Congress expressly recognized, prohibiting inappropriate interference need not prevent ensuring professionalism of the highest degree.[12]

7. *The sanctions herein do not threaten any legitimate public interest litigation activity.* Contrary to the petition's suggestion, the decision herein will not cause the decline of public interest litigation. Pet 18. First, public interest litigation does not require immunity from sanctions for bad faith litigation conduct. *See, e.g, Blue v. Department of the Army,* 914 F.2d 525 (4th Cir. 1990) (Sanctions affirmed; distinguished civil rights attorney held responsible for conduct of subordinates: "The authority which the federal courts possess, an authority often summoned to the side of racial justice is ... built upon respect for the judicial process. That authority cannot, in the long run, be effectively invoked on behalf of civil rights enforcement if civil rights litigants could themselves disregard it with impunity.") Second, the decisions herein reflect consideration and sensitivity towards public interest litigation, further demonstrating the judicial caution and restraint employed here, as well as the absence

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[11] *See*, e.g., Appellees' Brief on Appeal, p.23 n15 (linking names to PLF reports identifying management positions); CR 500, Exh. G, I & J; C-18-19, & CR 607, Tab 40 (state court litigation harassing BCPUD; another PLF Section Chief at trial level where state court found case "clearly frivolous," "brought to harass the District" and "for an improper motive"; PLF CEO and PLF Deputy Director were also on the meritless appeal for which the appellate court awarded additional fees).

[12] *See, e.g.*, 42 U.S.C. § 2996e (h)(3) (Legal Services Corporation: "ensur[ing]" compliance with professional responsibilities and not "interfer[ing] with carrying out professional responsibilities both mandated in same section)

of any threat. The district court itself observed herein:

> "No litigant should be penalized for a good faith, straightforward effort to extend, modify, or reverse the course of the law. Reasonable people may disagree about what the law is or ought to be, and it is imperative to the vitality of our democracy that individuals be afforded fair opportunities to try to persuade those who fix the terms of the law to change them. If PLF had engaged in a straightforward effort to change the law, there would be no occasion for these sanctions proceedings. That is not the course, however, that PLF chose to pursue."

E-8-9; *see also* -1 & DA-14.

8. *The sanctions award is fully compatible with the First Amendment.* In the courts below, the PLF also tried to avoid responsibility by claiming that it had some type of First Amendment immunity from sanctions. Although PLF has abandoned that argument, the petition closes by citing the same two cases on which it had relied, *NAACP v. Button*, 371 U.S. 415, 431 (1962) and *In re Primus*, 436 U.S. 412, 428 (1978), neither of which supported immunity from sanctions for litigation misconduct. *See* A-14 (Ninth Circuit: Cases cited by PLF do not support the "PLF's position that abuse of the court system is constitutionally protected when a public interest law organization is the perpetrator."); *see also* Appellee's Brief on Appeal, p.33, n.26; *cf Cohen v. Cowles Media*, 111 S.Ct. 2513, 2518 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has some incidental effects on its ability to gather and report the news"; "'publisher of a newspaper has no special immunity from the application of the general laws. He has no special privilege to invade the rights and liberties of others.'").

9. *Numerous traditional common law principles support the District Court's decision, which further illustrates the absence of any novel question requiring this Court's attention.* The PLF is a corporation and, as such, can only act through its agents. Even without the District Court's express findings of responsibility and of active participation, traditional principles of agency would adequately support the District Court's decision. Here, the senior attorney was the PLF's CEO, and the PLF's Deputy Director was also involved. Here, the PLF paid the "improper motive" and "harassment" sanctions for other litigation against BCPUD which had been supervised by a PLF Section Chief and, following the sanctions award, promoted him to PLF Director of Litigation. *See, supra,* note 11 and *compare* CR 500, Exh. I *with* CR 500, Exh. J. Both actual authority and apparent authority were reasonable inferences.[13] In addition to the principles of actual authority, apparent authority, and estoppel,[14] there is the doctrine of "inherent agency power" which is power derived "solely from the agency relation and exists for the protection of persons harmed by or dealing with

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[13] See, e.g., *Restatement of Agency (Second)*, § 7, p. 28 (1958) ("Actual Authority"), Comment b ("agent's conduct is authorized if he is reasonable in drawing an inference that the principle intended him so to act although that was not the principle's intent"); Comment c ("most authority is created by implication"); & § 8, p. 30 ("Apparent Authority"), Comment a ("manifestation of the principle . . . or by continuously employing the agent"), Comment c ("to the extent that it is reasonable to believe that the agent is authorized").

[14] PLF attorneys signed in the PLF's name; the PLF told everyone that it was a "law firm"; and one PLF attorney making an application in the PLF's name wrote BCPUD that "PLF is the attorney for the plaintiffs in Lockary". *See* O-8-10; P-4; Q-4-14.

a servant or other agent."[15]

10. *Agency issues involving non-profit entities do not require this Court's attention because they involve "settled rules" which have already been adequately addressed in previous decisions.* The responsibility of non-profit organizations for the acts of their employees acting under colorable authority is not a new question. *See, e.g., Claiborne v. NAACP*, 458 U.S. 886, 930 (1982) ("The NAACP -- like any other organization -- *of course may be held responsible for the acts of its agents* throughout the country that are undertaken within the scope of their actual or apparent authority.") (emphasis supplied) and *Hydrolevel v. American Society of Engineers*, 456 U.S. 556, 565-70 (1982) ("The apparent authority theory *has long been the settled rule* in the federal system." "In a wide variety of areas, the federal courts . . . have imposed liability upon principals for the misdeeds of agents acting with general authority." Non-profit corporation held liable for act of employee writing on corporation's stationery) (emphasis supplied).

Imposing sanctions upon the PLF itself under the circumstances of this particular case was neither novel, unprecedented nor inappropriate. Numerous separate, sufficient and independent bases exist to support the District Court's decision and the Ninth Circuit's affirmance. The petition should be denied.

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[15] See, e.g., *Restatement of Agency (Second)*, § 8A, p. 36 (1958) ("Inherent Agency Power"), Comment a (power based "neither upon consent nor upon . . . manifestations" is applicable to numerous situations including where "agent does something similar to what he is authorized to do, but in violation of orders," where "an agent acts purely for his own purposes," and where an agent "departs from the authorized method.")

IV. The Petition's Second Question Is Not Raised By The Decisions Below: The PLF Appeared, Did Not Contest "*In Personam* Jurisdiction" From The Outset, And Was Not Outside The Court's Reach.

The petition's second question assumes that the District Court did not have "*in personam* jurisdiction" over the PLF. Pet i. The question is not presented by the petition or the record, and the petition should be denied.

1. *The District Court expressly found that PLF had participated in the underlying litigation.* The District Court found that the PLF had been "actively involved in all phases of the case" (C-33, ¶ 36), and had been "on notice from the beginning" that defendants were likely to seek sanctions. C-32, ¶ 34; *see also* C-106 ("PLF has had abundant notice that sanctions were possible"). The PLF's own public statements regarding the litigation asserted that it had "actively participated" in the underlying litigation. C-34, ¶ 38. Early in the case, a PLF attorney repeatedly signed papers filed in the litigation in the PLF's name. *See* 0-7-9, noting examples at CR-5, CR-6, CR-9, CR-15, CR-17, & CR-18. A government records act application expressly in the PLF's name (*see* CR 604, ¶ 6 & Exh. B) was made to help circumvent the court's discovery stay order. C-18. Another PLF attorney wrote on PLF letterhead to BCPUD stating openly that: "PLF is the attorney for plaintiffs in Lockary." *Id.*, ¶4 & Exh. A. The PLF's CEO, counsel of record in the underlying litigation, also repeatedly referred to the case as one that "PLF filed." C-33-34. "Virtually every page of every pleading filed by plaintiffs ... has been on paper imprinted with the PLF logo, name, address, and telephone number." C-35, ¶ 39. That same PLF logo is used by the PLF to represent itself as a "public interest law firm." *See* CR 500, Exh. J *and* O-10 (logo and PLF's

description). Moreover, the underlying litigation sought attorneys' fees under federal statutes, and any such fee recovery would have gone "to the [PLF] organization rather than to individual [PLF] staff attorneys." *See* Rev. Proc. 75-13, 1975 C.B. 662. Under these circumstances, the PLF cannot reasonably be said to be the stranger to the underlying proceedings that its petition tries to portray.[16]

2. *The Ninth Circuit expressly affirmed the findings regarding the PLF's participation in the underlying litigation.* The Ninth Circuit said:

> PLF also takes issue with the district court's factual finding that it was responsible for the sanctionable conduct. PLF contends that it merely provided logistical support to the individual attorneys who represented the plaintiffs, and did not participate as an entity in any way in this suit. The record belies this assertion. While the PLF attorneys did not identify themselves as PLF employees in the signature block of the motions and pleadings, the heading of each court paper they filed listed the attorneys' names, followed by the name and address of PLF. Moreover, the plaintiffs were represented by a constantly changing cast of PLF attorneys, including PLF's president. PLF funded the litigation in its entirety. In its analysis of PLF's involvement, the district court relied on statements by PLF's president

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[16] The record is also replete with PLF's official publications and filings with the government that describe itself as a "public interest law firm." *See, e.g.*, O-3-8 *and* Q-4-14. Although the Ninth Circuit was willing to accept the PLF's protestations that it was not really a "law firm," it also concluded that PLF had actively participated in the underlying litigation. A-12.

> vaunting the importance of the Bolinas suit for PLF, and placing the case in the context of other, similar suits by PLF. The district court found that PLF was not "a mere passive and abstract institutional backdrop", but was, rather, "the sponsor of this litigation, and was actively involved in all phases of the case." We agree.

A-12.[17]

3. *The PLF also appeared and participated in the sanctions proceedings without raising or preserving an "in personam jurisdiction" objection.* The petition concedes, as it must, that the PLF "appeared before the District Court to defend against the sanctions motions". Pet 13. Did it attempt to file a "special" appearance? No. *See, e.g.*, CR 506 (first paper signed by attorney who separately appeared for PLF in sanctions hearing), & CR 510 (PLF's first

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[17] The quoted portion of the Ninth Circuit's opinion deals with the findings actually made by the District Court. It clearly states its agreement with the District Court's findings of actual participation, sponsorship and responsibility. Contrary to this clear affirmance, the petition dwells on the Ninth Circuit's incidental observations regarding post-remand events subsequent to the sanctions ruling, points on which the District Court did not rely and could not have relied, and other later events involving claims for which the PLF was not sanctioned. *See* BCPUD Opposition to PLF's Petition for Rehearing, p. 5-7. From these irrelevancies, however, the petition tries to suggest that the Ninth Circuit rejected the District Court's findings and "found" its own facts on which it affirmed. While the Ninth Circuit may not have thought it necessary to characterize the PLF as a"law firm," something the PLF itself had been doing for decades, it clearly agreed with the District Court that the PLF was "actively involved in all phases of the case" and was the entity "directly responsible for the sanctioned misconduct." A-11-13 & n.2.

opposition brief.)[18] Did it promptly raise an objection in terms of "*in personam* jurisdiction" or "personal jurisdiction" in the first paper filed? No. Did it do so in the second or third paper? No. *See* CR 510 & CR 585. The petition asserts, inaccurately, that when the PLF filed CR 510 (April 1988) and CR 585 (February 1989), it "opposed the sanctions motions, arguing, among other things that the district court lacked *in personam* jurisdiction over petitioner." Pet 3-4. The PLF's opposition papers, however, do not even contain the word "jurisdiction," let alone the expressions *in personam* jurisdiction" or "personal jurisdiction." In fact, the PLF did not express an objection to "*in personam* jurisdiction" while participating for nearly two years in the sanctions proceedings during 1988-1989.

Moreover, when the District Court indicated that it was going to refer the sanctions motions to a special master, the PLF participated in the process of nominating and recommending the agreed-upon candidates. *See* CR 528 & CR 543 (request for nominations; agreed nominations letter & referral order). The criticism (Pet 4) that the "district court ignored petitioner's jurisdictional argument and referred the motions to a federal magistrate sitting as special master" is unfounded. None of the PLF papers filed before the referral (CR 506 & CR 510) even contained the word "jurisdiction."

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[18] In CR 506, through counsel expressly signing for the PLF, the PLF joined with the others in a stipulation setting forth and requesting a briefing and hearing schedule, but PLF did not assert or reserve any objection to "*in personam* jurisdiction.". On CR 510, the attorneys for PLF in the sanctions proceedings simply listed their appearance as "Attorneys for Pacific Legal Foundation" without any attempt to qualify or restrict their appearance.

4. *Imposing sanctions on the PLF was not "in direct conflict" with this court's decision in Zenith v. Hazeltine.* In this litigation, the District Court imposed sanctions on the PLF, which not only appeared and actively participated in the sanctions proceedings, but also was found to have "actively participated" in the underlying litigation. *Zenith Corp. v. Hazeltine,* 395 U.S. 100, 108-112 (1968) did not involve sanctions issues or a court's need to protect itself or its procedures from misuse. The case is inapposite, and no conflict exists requiring this court's attention.[19]

5. *Imposing sanctions on the PLF was also not in conflict with the Seventh Circuit's decision in Panther Pumps.* Similarly, there is no conflict between the Seventh Circuit's decision in *Panther Pumps & Equipment Co. v. Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir. 1977), and the Ninth Circuit's decision herein. It is also inapposite, another non-sanctions

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[19] For example, in contrast to the PLF's participation in both the underlying litigation and the sanctions proceedings, Hazeltine, the corporation whose name appeared in a judgment "based wholly on the stipulation of HRI," "did not execute the stipulation," "never formally appeared at trial," and "never had its day in court". The judgment against Hazeltine was on a counterclaim which only named HRI as a defendant. "Hazeltine made no appearance in the litigation until Zenith proposed that judgment be entered against it, at which time, Hazeltine filed a 'special appearance.'" The Supreme Court also noted that the record did not show that, when Hazeltine made its special appearance, the district court found it to have been "in active concert or participation" with HRI. *See also Hazeltine Research, Inc. v. Zenith Radio Corporation,* 388 F.2d 25, 30 (7th Cir. 1967) ("At no time during the trial did [Hazeltine] have an opportunity to show that it was not the alter ego.") The PLF herein had numerous opportunities to address the sanctions issues and actually appeared and participated in the sanctions proceedings.

case involving a company which did not participate in either the underlying litigation or the post-judgment proceedings. If anything, the Seventh Circuit's willingness to hold Beck in contempt based on his relationship to the underlying litigation, although he had not been a party to the underlying litigation, would tend to support the District Court's decision herein. That it dismissed the appeal as to Universal, a company formed by Beck after the initial judgment, is immaterial. Unlike Universal, which apparently did not participate in Beck's show cause proceedings, the petition herein concedes that the PLF "appeared before the district court to defend against the sanctions motions". Pet. 13.

The District Court found that "PLF actively participated" in the underlying litigation. The petition concedes PLF's appearance and participation in the sanctions proceeding. The petition, however, inaccurately asserts that PLF raised and argued an "*in personam* jurisdiction" objection in CR 510 and CR 585. Pet. 3-4. The petition's second contention is not presented by the petition or the record, and the petition should be denied.[20]

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[20] The absence of an express "*in personam* jurisdiction" objection and argument is telling, because the PLF did argue even minor technical points if it desired to raise them. A court order had expressly extended the time in Local Rule 270-1. CR 472. Nevertheless, PLF did try to argue in CR 510 that the motions were untimely for failure to comply with that very rule, despite the court's express order and despite that rule's express reference permitting the judge to "grant extensions of time for the filing of an application." This "point" would hardly have been "jurisdictional," and it was certainly not an "*in personam* jurisdiction" argument. It does illustrate, however, that the PLF's failure to raise "*in personam* jurisdiction" expressly was a conscious decision. The argument now made is merely a contrivance.

CONCLUSION

The claims presented by PLF's petition are neither significant nor meritorious, and the lower court's actions are fully supported by the copious record that was developed so painstakingly by the Special Master and the District Court. For these reasons, granting the petition would serve no useful purpose. By contrast, allowing PLF to prolong these proceedings would impose serious additional hardship upon BCPUD. Its meager financial resources have already been severely taxed, and further litigation in this Court would only add to these burdens. That hardship would remain even after BCPUD prevailed on the merits of the issues which PLF's petition attempts to raise.

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APPENDICES

APPENDIX N

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Attorneys for Defendant Bolinas
Community Public Utility District

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, SUSAN IRLAND LOCKARY; PHYLLIS GILBERT; CHARLES GILBERT; JAMES MACEY; ANTON HOLTER: MESA RANCH INC., a California limited partnership,	) Civ. No. C-82-6191 SW)) DECLARATION OF RICHARD E.V. HARRIS IN SUPPORT OF BCPUD'S APPLICATION FOR ATTORNEYS' FEES AND EXPENSES
Plaintiffs,	
v.	
PAUL KAYFETZ; VICTOR AMOROSO; MARY LOWRY;	) Date: April 6, 1988) Time: 10:00 a.m.

DIANA LOPEZ FARNSWORTH; EDWARD C. RILEY; PETER WARSHALL; DORIS ELAINE LeMIEUX; JACK BOWEN McCLELLAN; J. MICHAEL GROSHONG; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,an incorporated public utility district; BOLINAS PLANNING COUNCIL, a non-profit corporation; JOHN GOODCHILD; GREGORY C. HEWLETT; STEVE MATSON; PATRICIA L. SMITH; RAY MORITZ; ROBERT J. SCAROLA; DIANE MIDDLETON McQUAID; FREDERICK G. STYLES; and the COUNTY OF MARIN,

Defendants.

I, Richard E. V. Harris, do hereby declare as follows:

1. I am a partner with the law firm of Orrick, Herrington & Sutcliffe and am one of the attorneys for defendant Bolinas Community Public Utility District ("BCPUD"). If called as a witness, I could testify to the following of my own personal knowledge.

2. My firm was retained by BCPUD to represent it in this action in November 1982. BCPUD is a public utility district which provides water service and sewer service

to customers in the Bolinas area. As indicated by financial and other reports, BCPUD has always been in precarious financial condition. Attached to this Declaration as Exhibit A is a true and correct copy of BCPUD's audited financial statement for the fiscal year ending June 30, 1982. As shown therein, for the fiscal year which preceded the filing of this lawsuit, BCPUD's total revenues amounted to only $278,571. For that same period, BCPUD's expenses totalled $277,115. To finance its defense efforts, BCPUD was forced to impose a special assessment which, I am informed, substantially increased the economic burden on users of BCPUD water sources.

3. The financial difficulties which BCPUD would (and did) face in defending the claims asserted against it in this action were well-known. Attached to this Declaration as Exhibit B are the reported comments of one of the plaintiffs, Matthew Lockary, who is said to have commented about a month before this action was filed that BCPUD was "nearly broke" and would be hard pressed to defend the suit.

* * *

8. In recognition of the fact that focused discovery would be virtually impossible in light of the broad, garbage-can nature of the complaint and amended complaints, I proposed to this Court at an early stage that all discovery be stayed until the motions to dismiss were resolved. On March 3, 1983, in its initial status conference order, this Court ordered a stay of discovery until defendants' motions to dismiss were resolved.

9. Notwithstanding the stay of discovery which was ordered by the Court, plaintiffs' counsel made a request on September 30, 1983 under the California Public Records Act that asked BCPUD to produce virtually each and every

document in its possession relating to the moratorium. Notwithstanding the extraordinary broad nature of the request and the existence of the discovery stay, BCPUD did its best to respond. After obtaining certain clarification and limitations on the request, BCPUD made available virtually all of its documents relating to its water system or the moratorium. Nevertheless, the Pacific Legal Foundation ("PLF") pursued litigation in state court seeking a writ of mandate against BCPUD to produce the requested documents.

10. In response to the PLF's complaint, the Superior Court of Marin County concluded that the PLF's claims were wholly without merit. The Court went on to find that the plaintiff's case was "clearly frivolous" and brought solely "to harass the District" and "for an improper motive." The Court awarded sanctions against the PLF. Attached to this declaration as Exhibit E is a true and correct copy of the Superior Court's decision. This decision was affirmed on appeal. Attached to this declaration as Exhibit F is a true and correct copy of the decision of the First Appellate District affirming the lower court's decision.

* * *

16. I am aware that the PLF is a well-financed organization engaged primarily in the "business" of litigation. Attached as Exhibit G is a true and correct copy of the PLF's Periodic Report filed with the State of California for the year ending February 28, 1983. That annual report reflects that the PLF received gross contributions for that year in excess of $2,200,000. The PLF Periodic Reports for the subsequent three years each reflect gross contributions in excess of $2,000,000.

17. Attached to this declaration as Exhibit H is a PLF publication which discusses the Lockary litigation. On

page 2 of that publication, the PLF's president explains his rationale in asserting massive damages claims against so many individual defendants.

18. I am aware that the PLF has made reference to the Lockary litigation in reports to prospective contributors and has publicized its efforts in this case. Even after the claims in this action were rejected by the Court, the PLF continued to publicize its litigation effects against BCPUD. Thus, within the past few months, the PLF publicized its more recent filing of a state action against BCPUD challenging the same moratorium that was the subject of the present action. Attached to this declaration as Exhibit H through K are copies of some of the PLF publicity references to its litigation against BCPUD.

Executed this 16th day of February, 1988, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

_____

Richard E. V. Harris

APPENDIX O

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Attorneys for Defendant Bolinas
Community Public Utility District

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, PHYLLIS GILBERT; CHARLES GILBERT; JAMES MACEY; ANTON HOLTER,	) Civ. No. C-82-6191 SW
Plaintiffs,	) DECLARATION OF RICHARD E.V. HARRIS AND REQUEST FOR JUDICIAL NOTICE RE: (a) PACIFIC LEGAL FOUNDATION LAW FIRM AND (b) THE $30 MILLION-PLUS PRAYER
v.	
PAUL KAYFETZ; VICTOR AMOROSO; MARY LOWRY; DIANA LOPEZ FARNSWORTH; EDWARD C. RILEY; FREDERICK B. McCLELLAN; PETER WARSHALL; DAVID L. VAN	) Date: June 15, 1988) Time: 10:00 a.m.

DUSEN; DORIS ELAINE LeMIEUX; JACK BOWEN McCLELLAN; J. MICHAEL GROSHONG; WILLIAM NIMAN; JUDITH WESTON, as individuals; BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT, an incorporated public utility district; BOLINAS PLANNING COUNCIL, a non-profit corporation; JOHN GOODCHILD; GREGORY C. HEWLETT; STEVE MATSON; PATRICIA L. SMITH; RAY MORITZ; ROBERT J. SCAROLA; DIANE MIDDLETON McQUAID; FREDERICK G. STYLES, as individuals; and the MARIN COUNTY PLANNING DEPARTMENT,

Defendants.

DECLARATION

I, Richard E.V. Harris, do hereby declare that:

1. I am a member of the Bar of the State of California, a member of the bar of this court, and a member of the law firm of Orrick, Herrington & Sutcliffe, attorneys for defendant Bolinas Public Utility District ("BCPUD") herein.

(a) PLF LAW FIRM

2. I have read the separate opposition papers filed on behalf of the Pacific Legal Foundation, which I found rather curious. Throughout the separate opposition filed by the Pacific Legal Foundation, it refers to itself variously as (i) "a California nonprofit corporation qualified under Internal Revenue Service Rules to receive tax-deductible donations," (ii) "not a party in this case", (iii) "a charitable corporation", (iv) "a nonparty corporation", (v) "a nonparty-nonattorney corporation", and (vi) "neither a party to this case nor an attorney admitted to practice before this Court."

3. Nowhere in the papers does the Pacific Legal Foundation refer to itself as it, and its attorneys, normally describe it -- a "law firm" or, more particularly, a "public interest law firm." This declaration provides some illustrations. (Unless otherwise indicated, the emphasis in quotations in this declaration has been supplied.) Defendant BCPUD requests judicial notice of the particular references identified. The exhibits (attached hereto and those attached to the Harris Declaration filed February 16, 1988) are provided in further support of that request.

4. The Pacific Legal Foundation has represented itself to be a law firm which participates in litigation "as counsel" and which exercises "quality control." For example, the Pacific Legal Foundation's "Tenth Annual Report 1973-1983" the first page of text includes the following:

> It was to evolve into the Pacific Legal Foundation, the largest nonprofit public interest law firm of its kind . . . . PLF's case selection . . . . PLF participates in cases nationwide as plaintiff, as counsel and as

"friend of the court. . . . insured quality control . . . .

(See Harris Decl. filed February 16, 1988, Exh. I.)

5. The Pacific Legal Foundation has represented itself to the Internal Revenue Service and to the Attorney General of California as a "Public Interest Law Firm." A copy of the Pacific Legal Foundation's Periodic Report to Attorney General of California for the year March 1, 1982 through February 28, 1983 which expressly incorporates the IRS Form 990, Return of Organization Exempt from Income Tax, for the same period, is attached as Exhibit G to the Harris Declaration filed February 16, 1988. See IRS Form 4562 where the business or activity of the Pacific Legal Foundation is expressly stated to be "Public Interest Law Firm." Attached hereto as Exhibit A is a true and accurate copy (provided by the State of California at my request) of the Pacific Legal Foundation's Periodic Report to Attorney General of California for the period March 1, 1983 through February 29, 1984 (when the amended complaint was filed herein), also expressly incorporating IRS Form 990 which also includes IRS Form 4562 expressly identifying the business or activity of the Pacific Legal Foundation as "PUBLIC INTEREST LAW FIRM."

6. Ronald A. Zumbrun (the senior PLF attorney, whose name is on all or virtually all papers filed in this case by the PLF) refers to the Pacific Legal Foundation as a "law firm" and also refers to someone represented as a "Pacific Legal Foundation client". For example, the May 13, 1985 issue of The Recorder (at page 4) contains a "viewpoint" article by Ronald A. Zumbrun entitled "Pacific Legal Foundation Reviews Critical Property Rights Cases". Identified as "one of a series of articles by Ronald A. Zumbrun, President of the Pacific Legal Foundation," the

text of the article begins by stating that, when the Pacific Legal Foundation was formed in Sacramento in 1973,

> it became the first nonprofit public interest law firm which litigated in support of the free enterprise system . . . .

Halfway through the article, Mr. Zumbrun turns to a Coastal Commission matter in this way:

> Ponder the plight of another Pacific Legal Foundation client, Viktoria Consiglio.

7. On the next day, May 14, 1985, The Recorder (at page 2) contained another viewpoint article by Ronald A. Zumbrun, who is identified as "President of the Pacific Legal Foundation, a Sacramento-based public interest law firm that litigates in support of limited government . . . ." This viewpoint article includes references to the Gilberts' claim against BCPUD, including the following:

> If the Gilberts prevail, they will be entitled to damages against the members of the board of directors of the water of district who, under the Civil Rights Act, would be personally liable to those individuals whom they have intentionally damaged. If successful, this lawsuit will have precedential value nationally and could single-handedly reverse the confiscatory trends in the area of land use regulation.

This Zumbrun viewpoint article is entitled "Pacific Law Foundation's Involvement in Limiting Reach of Government." Attached hereto as Exhibit B are true and accurate copies of these articles from the May 13 and 14,

1985 issues of The Recorder.

8. The March, 1983 issue of Pacific Legal Foundation's The Reporter contains a "President's Message" column by Ronald A. Zumbrun which is entitled "Just Compensation: The Case We've Been Waiting For." In it, his references to the Bolinas litigation include:

> PLF has filed suit against the district in federal court, thus circumventing the California courts, which have been decidedly reluctant to clarify the just compensation issue in other PLF cases. We are seeking substantial personal damages from the water district board members, putting all government entities on notice that we are going to the mat with this one.

On the first page of that same issue of the The Reporter, there is another article referring to this litigation entitled "PLF Files Major Water Rights Case." (Mr. Zumbrun's column expressly references that article.) The article includes the following references:

> One of the most significant PLF lawsuits in recent years was filed late last year in San Francisco federal court . . . .
>
> PLF filed suit on behalf of five property owners in Bolinas . . . .
>
> By filing this suit in federal court, PLF hopes to stem this frightening practice from moving nationwide.

***

> As in many land use cases brought by PLF, ...
>
> The PLF suit alleges that water district policies violate the Fifth Amendment guarantee of payment of just compensation, ... This case will be an extremely important one for PLF, ...

Attached hereto as Exhibit C is another copy of the above stories from Pacific Legal Foundation's March 1983 issue of The Reporter.

9. The Pacific Legal Foundation's literature soliciting contributions also describes the PLF as a "law firm." For example, the first page of a December 22, 1982 solicitation letter (sent shortly after this case was filed) contains the following:

> Pacific Legal Foundation is an independent nationwide public interest law firm defending individual freedom, private property rights, and the free enterprise system. PLF is successfully confronting governmental bureaucracies, environmental extremists, welfare rights organizations, and other special interest groups.

Later, the solicitation letter states:

> Today, PLF is handling more than 100 legal proceedings across the United States. Your financial assistance will make it possible to carry this burden to conclusion.

Attached hereto as Exhibit D is a true and accurate copy of

the PLF's December 22, 1982 solicitation letter.

10. At the beginning of the PLF's separate opposition papers, there appears this sentence:

> Pacific Legal Foundation has not signed a "pleading, motion, or other paper" to be filed in this court.

The statement was apparently made in an effort to dispel any idea that the Pacific Legal Foundation really has had anything to do with this litigation. While I have not reviewed all the files, a quick beginning revealed the following examples where papers were expressly signed on behalf of the Pacific Legal Foundation:

> PACIFIC LEGAL FOUNDATION
>
> By: /signed/
> DARLENE E. RUIZ
> Attorneys for Plaintiffs
> MATTHEW LOCKARY; PHYLLIS GILBERT;
> CHARLES GILBERT; JAMES MACEY;
> ANTON HOLTER

(See Docket No. 5)

> Pacific Legal Foundation
>
> by /signed/
> Darlene Ruiz
> Attorney for Plaintiffs

(See Docket No. 6)

Pacific Legal Foundation

by /signed/
Darlene Ruiz
Attorney for Plaintiffs

(See Docket No. 9)

PACIFIC LEGAL FOUNDATION

By /signed/
DARLENE E. RUIZ
Attorneys for Plaintiffs

(See Docket No. 15)

PACIFIC LEGAL FOUNDATION

By /signed/
Darlene E. Ruiz

Attorneys for Plaintiffs

(See Docket No. 17)

PACIFIC LEGAL FOUNDATION

By /signed/
DARLENE E. RUIZ
Attorneys for Plaintiffs

(See Docket No. 18)

11. Of course, the Pacific Legal Foundation's logo, name, address and telephone number were already preprinted on the thousands of pages of papers filed in this action by the PLF attorneys. (See, e.g. Complaint, Docket No. 1 and Amended Complaint, Docket No. 112.) Other PLF use of the law firm logo includes the following example from the PLF's "Tenth Annual Report 1973-1983:"

[INSERT LOGO]

(See Harris Decl. filed February 16, 1988, Exh. I, last page.) In addition, the PLF attorneys' correspondence with the court regarding this litigation, as well as correspondence with opposing counsel and others, has been on Pacific Legal Foundation letterhead.

(b) THE $30 MILLION--PLUS PRAYER

12. The plaintiffs sought enormous damages from, among others, BCPUD and the individual defendants. Plaintiff's opposition papers inaccurately suggest that "the $30 million prayer for damages and the terrifying effect of such a prayer" "was laid to rest nine months after the filing of the Complaint." (Opposition, p. 2: 10-16.) The opposition papers also suggest that the cloud over BCPUD's finances "could only exist, if at all, for about nine months the time between the original Complaint, filed November 10, 1982, and the Amended Complaint, and that after the

dismissal of the antitrust claims, "any cloud existing in BCPUD's imagination surely should have evaporated since the basis for trebling damages was gone." (Id., p. 56: 6-15.)

13. The original Complaint's prayer had numerous references to damages, including the following:

> WHEREFORE, plaintiffs pray for judgment against defendants as follows:
>
> 1. Damages for violation of plaintiffs' civil rights in the amount of $10 million.
>
> ***
>
> 4. Judgments for three times the amount of actual damages for violation of Sections 1 and 2 of the Sherman Act which plaintiffs allege are in excess of $10 million to be trebled as provided by law.
>
> ***
>
> 7. Interim damages for a temporary taking . . . .
>
> 8. In the alternative and cumulatively as appropriate to plaintiffs' prayer for declaratory, injunctive, and interim damage relief prayed for hereinabove, plaintiffs pray for judgment against defendants as follows:
>
> > a. damages for the fair market value of the property in an amount not presently precisely ascertainable but not less than $10 million. A more

> precise amount of damages will be proven and prayed for at time of trial;
>
> b. Interim damages for a temporary taking in an amount not yet precisely ascertainable.
>
> ***
>
> 12. Other consequential damages flowing directly from defendants' course of conduct herein described which plaintiffs may have suffered but not discovered or which they may hereafter suffer.
>
> ***

14. Although the Amended Complaint may have dropped the express dollar amounts, nothing alleged that plaintiffs had changed their position regarding fair market values, the magnitude of actual damages, or the expansive damages sought. Indeed, the Amended Complaint filed August 3, 1983, increased the number of plaintiffs, the number of defendants, and the number of "claims." There was no reduction in the amount of property allegedly "taken" (which plaintiffs alleged in the original Complaint had a "fair market value . . . not less than $10 million"). Both complaints sought a determination and trebling of the actual damages resulting from the alleged antitrust violations (which the plaintiffs alleged in the original Complaint were "in excess of $10 million"). Additionally, the prayers in both complaints continued to seek civil rights damages, interim damages, attorneys' fees, litigation costs, and other monetary items, including "[o]ther consequential damages flowing from the defendants' course of conduct . . . which plaintiffs may have suffered but not discovered or which they may hereafter

suffer."

15. When the Amended Complaint was filed, there was no formal or informal statement by plaintiffs or plaintiffs counsel that the Amended Complaint sought less in damages than was sought in the original Complaint. Although the prayers in both complaints state that damages for the fair market value of the property allegedly taken would be proven and prayed for at the time of trial, I can find nothing in the Amended Complaint which, for example, backs off the allegation of the original Complaint that the fair market value of the property taken is "not less than $10 million."

16. In April 1984, other defense counsel and I met with plaintiffs' counsel to discuss various matters relating to discovery. Following up on oral requests made at that meeting, I wrote plaintiffs' counsel on April 23, 1984 requesting, among other things, their contentions as to the amount of damages each plaintiff was seeking plus the basis for the claimed damages. A true and accurate copy of my letter of April 23, 1984 is attached hereto as Exhibit E. The information was not provided, despite repeated requests, both oral and written. Attached hereto as Exhibit F is a copy of my letter dated May 9, 1985 to plaintiffs' counsel, which contains another written request for the damages contention information. The requested information regarding the damages amounts (and bases) was never provided.

17. As recently as the Ninth Circuit prebriefing conference, which was held on March 28, 1988 plaintiffs' counsel informed me and other defense counsel that plaintiffs were not willing to eliminate any claims against any defendants from their appeal. Plaintiffs' suggestion that the "terrifying effect" of their damages claims "was laid to rest"

in August 1983 is, I believe, inconsistent with the record in this litigation.

Executed this 1st day of June, 1988 at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

Richard E. V. Harris

APPENDIX P

RICHARD E. V. HARRIS
GEORGE A. YUHAS
ORRICK, HERRINGTON & SUTCLIFFE
600 Montgomery Street
San Francisco, California 94111
Telephone: (415)392-1122

Attorneys for Defendant Bolinas
Community Public Utility District

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY; SUSAN IRLAND LOCKARY; PHYLLIS GILBERT; CHARLES GILBERT; JAMES MACEY; ANTON HOLTER; MESA RANCH INC., a California limited partnership,	)))))Civ.No. C-82-6191SW/WDB))SUPPLEMENTAL)DECLARATION)OF RICHARD E.V.)HARRIS RE: (a) PLF'S)STATUS, AND (b))SANCTIONS PAID BY
Plaintiffs,	)PLF IN CONNECTION)WITH 1983 PUBLIC

v.	)RECORDS ACT
	)LITIGATION
	)AGAINST BCPUD AND
BOLINAS COMMUNITY	)SUBSEQUENT APPEAL
PUBLIC UTILITY	)
DISTRICT; PAUL	)
KAYFETZ;	)Status Conference
VICTOR AMOROSO;	)
MARY LOWRY;	)Date: March 14, 1989
DIANA LOPEZ	)Time: 10:00 a.m.
FARNSWORTH;	)
C. RILEY; PETER	)
WARSHALL; DORIS	)
ELAINE LeMIEUX;	)
JACK BOWEN	)
McCLELLAN;	)
J. MICHAEL GROSHONG;	)
WILLIAM NIMAN;	)
ORVILLE SCHELL;	)
MARGUERITTE HARRIS;	)
JUDITH WESTON;	)
BOLINAS COMMUNITY	)
PUBLIC UTILITY	)
DISTRICT, an	)
incorporated public	)
utility district;	)
BOLINAS PLANNING	)
COUNCIL, a non-profit	)
corporation; JOHN	)
GOODCHILD; GREGORY	)
C. HEWLETT; STEVE	)
MATSON; PATRICIA L.	)
SMITH; RAY	)
MORITZ; ROBERT J.	)
SCAROLA; DIANE	)
MIDDLETON McQUAID;	)

FREDERICK G. STYLES; and the COUNTY OF MARIN,

Defendants.

I, Richard E.V. Harris, do hereby declare as follows:

1. I am a partner with the law firm of Orrick, Herrington & Sutcliffe and one of the attorneys for defendant Bolinas Community Public Utility District ("BCPUD"). If called as a witness, I could testify to the following of my own personal knowledge.

A. PLF'S STATUS

2. This portion of this declaration supplements the DECLARATION OF RICHARD E.V. HARRIS AND REQUEST FOR JUDICIAL NOTICE RE: (a) PACIFIC LEGAL FOUNDATION LAW FIRM AND (b) THE $30 MILLION-PLUS PRAYER, filed June 1, 1988, and made part of BCPUD's APPENDIX filed January 6, 1989, at Tab No. 9. In paragraphs numbered 2-11, and the exhibits thereto, I referred to various Pacific Legal Foundation ("PLF") statements that it was a "law firm," that it participated in cases "as counsel," and that a person represented was a "Pacific Legal Foundation client." In paragraph 10, I also referred to specific instances in this Court's files where papers were expressly signed on behalf of the Pacific Legal Foundation.

3. In its recent "RESPONSE OF PACIFIC LEGAL FOUNDATION TO THE MOTION FOR SANCTIONS," the

PLF states on page 1 that "PLF is neither a party to this case nor an attorney for a party." On page 4 the PLF states that "BCPUD requests sanctions against 'plaintiffs and their attorneys' -- a group that does not include Pacific Legal Foundation within its membership." And, on page 6, the PLF states that "PLF was not 'plaintiffs' counsel' in this action, ..."

4. The recent statements by the PLF in its response to the motion for sanctions seemed to me to be at odds with not only the PLF's statements in its own publications and the record referred to above, but also with PLF correspondence with BCPUD after this case had been pending for approximately one year. In a letter to BCPUD's general manager from PLF attorney James I. Collins on Pacific Legal Foundation letterhead, Mr. Collins stated:

> PLF is the attorney for plaintiffs in Lockary; it is not a party.

Attached hereto as Exhibit A is a true and accurate copy of the November 2, 1983 letter from PLF attorney Collins to BCPUD General Manager Buchanan, which copy is attached to a Declaration of Phil Buchanan in Wolfe v. Bolinas Community Public Utility District (Marin County Superior Court No. 115257).

B. SANCTIONS PAID BY PLF

5. In its response to the motion for sanctions and attorneys fees herein, the PLF apparently is attempting to distance itself from the state court decisions in Wolfe v. Bolinas Community Public Utility District by stating that "no sanctions were expressly levied against PLF." (Emphasis original.) A true and accurate copy of the Marin County

Superior Court's January 19, 1984, Order is in BCPUD's Appendix filed January 6, 1989 at Tab No. 8, Exhibit E. It states, in part:

> Respondent would be entitled to attorneys fees if the Court finds that the "plaintiff's case is clearly frivolous . . ."
>
> It would appear that petitioner brought this action to harass respondent district. Petitioner is represented by Pacific Legal Foundation as is the plaintiff in the federal action. It appeared that the disclosures plaintiff sought in this action were to be used in prosecuting the federal action. A review of events leading to the filing of this action convinces this Court that this action was brought for an improper motive. Therefore, respondent is entitled to reasonable attorneys fees and costs. A reasonable fee for such services is $1,360.00 plus court costs of $14.50. Respondent shall have judgment against petitioner for said sums.

6. The Marin Court Superior Court's decision was affirmed by the Court of Appeal for the First Appellate District. A true and accurate copy of that appellate decision can be found in BCPUD's Appendix at Tab No. 8, Exhibit F. In a unanimous decision, the court stated, in part:

> Appellant argues that the judgment must be reversed because . . . and (3) the action was brought in good faith. We disagree with each of these contentions.
>
> On September 30, 1983,

> appellant, through his attorneys, the Pacific Legal Foundation, contacted respondent. He requested that he be permitted to inspect, as the trial court put it, 'virtually all of [respondent's] records.'
>
> * * *
>
> Finally, appellant disputes the trial court's finding that he brought the action for an improper motive and meant 'to harass respondent district.' Considering the sheer volume of documents which appellant designated, his demands of immediate compliance with these extensive requests; his insistence on filing suit in spite of respondent's keeping him constantly informed of its progress; and his going forward with the December 9 hearing even though respondent had already made the records available to his satisfaction, the trial court's determination was reasonable and well supported by the evidence. Respondent was properly awarded costs and attorneys fees. (Emphasis in original)

7. Although the recent PLF response states that "no sanctions were expressly levied against PLF," it does not state that the sanctions were not, in fact, paid by the PLF. As outlined below, the PLF, not Wolfe, apparently did pay the sanctions/attorney fees resulting from the two state court decisions in Wolfe.

8. With respect to request for BCPUD's documents, the formal application signed by PLF attorney lists the "Pacific Legal Foundation" as the "applicant," not Wolfe or anyone else. A true and accurate copy of the BCPUD form signed by the PLF attorney is attached hereto as Exhibit B.

9. The bad faith and harassment findings having been affirmed along with the Government Code Section 6259 attorneys fee award, BCPUD sought additional fees and costs of $4,708.80 under that Government Code Section in a state court filing on July 21, 1986.

10. I was informed shortly after September 5, 1986 that the $4,708.80 was paid by a Pacific Legal Foundation check, numbered 2602, dated 8-25-86, drawn on a PLF account at the Great American Federal Savings and Loan Association in Sacramento, California, sent to BCPUD's attorney in Wolfe. Attached hereto as Exhibit C is a true and accurate copy of the cover letter I received together with a copy of the PLF check. I have subsequently been informed that the remainder of the $6,274.25 (the $1,274.50 awarded by the trial court in 1984 and $190.90 interest) were paid using Great American cashier's checks, dated 7-10-86 and 7-17-86, which were also sent by the PLF to BCPUD's attorney in Wolfe.

Executed this 6th day of March, 1989, in the City and County of San Francisco.

I declare under penalty of perjury that the foregoing is true and correct.

_____

Richard E. V. Harris

APPENDIX Q

RICHARD E. V. HARRIS
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Old Federal Reserve Bank Building
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Telephone: (415)392-1122

Attorneys for Defendant Bolinas
Community Public Utility District

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, SUSAN IRLAND LOCKARY; PHYLLIS GILBERT; CHARLES GILBERT; JAMES MACEY; ANTON HOLTER: MESA RANCH INC., a California limited partnership,	) Civ. No. C-82-6191 SW/WDB) DECLARATION OF RICHARD E. V. HARRIS IN FURTHER SUPPORT OF BCPUD'S APPLICATION FOR SANCTIONS/FEES [STAGE II PROCEEDINGS]
Plaintiffs,	
v.	
PAUL KAYFETZ, VICTOR AMOROSO; MARY LOWRY;	

DIANA LOPEZ FARNSWORTH; EDWARD C. RILEY; PETER WARSHALL; DORIS ELAINE LeMIEUX; JACK BOWEN McCLELLAN; J. MICHAEL GROSHONG; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT, an incorporated public utility district; BOLINAS PLANNING COUNCIL, a non-profit corporation; JOHN GOODCHILD; GREGORY C. HEWLETT; STEVE MATSON;PATRICIA L. SMITH; RAY MORITZ; ROBERT J. SCAROLA; DIANE MIDDLETON McQUAID; FREDERICK G. STYLES; and the COUNTY OF MARIN,

Defendants.

I, Richard E.V. Harris, do hereby declare as follows:

1. I am a member of the Bar of the State of California and member of the Bar of this Court. I am also a member of the law firm of Orrick, Herrington & Sutcliffe, attorneys for defendant Bolinas Community Public Utility District ("BCPUD") in this action. If called as a witness, I could testify to the following of my own personal knowledge.

PLF OPERATIONS:
FINANCIAL RESOURCES

2. According to the IRS Form 990's filed by the Pacific Legal Foundation ("PLF") with its Periodic Reports to the Attorney General of California, the PLF's annual revenues have been substantial during each of the years that the Lockary case has been pending. Total PLF revenues (by fiscal year) are shown on those reports as follows:

PLF Fiscal Year	PFL Revenues Per IRS Form 990
1982-1983	$2,559,274
1983-1984	2,446,651
1984-1985	2,481,839
1985-1986	2,265,076
1986-1987	2,405,115
1987-1988	2,905,457
1988-1989	4,217,701
1989-1990	5,835,885

From 1982-83, when Lockary was filed, through February 1990, the PLF's total revenues, as shown on these reports, were $25,116,998. True and accurate copies of excerpts from the IRS 990's filed as part of those reports are attached as Exhibit A.

3. The PLF publishes In Perspective, a newsletter. The Winter 1989 issue contained the PLF's description of one of its fundraising activities. Entitled "PLF Fundraising Event Brings Private Property Advocates Together," the PLF description contained the following:

More than 250 members of the nation's

> real estate development community gathered in Sacramento on November 2 for a special fundraising tribute to PLF's activities in the land use and private property arena.
>
> * * *
>
> Following Zumbrun, Raymond Watt, chairman of Watt Industries in Los Angeles and a member of the Host Committee, expressed his thanks to the Foundation and asked everyone present to carry the PLF fundraising flag.
>
> "If every PLF supporter would call just one other potential supporter, we could take care of PLF's funding needs overnight," he said.

Attached as Exhibit B is a true and accurate copy of the page from the Winter 1989 issue of the PLF's In Perspective.

PLF OPERATIONS:
LITIGATION LAW FIRM STATUS, LITIGATION AND TRAINING FUNCTIONS

4. Additional information regarding the PLF and its operations is provided below. Most of the information comes directly from the PLF's own publications; that information is provided first.

5. According to its annual reports, the PLF claims a very close relationship to the litigation process and the courts. The annual reports indicate that the PLF is not merely a law firm but that it is a litigation law firm. At least one report says that the PLF regards "the courtroom" as its

"forum." Another says that the PLF's "main function is litigation."

6. Excerpts from some annual reports and other PLF publications are identified and highlighted below. (The emphasis in quotations below has been supplied unless otherwise indicated.) True and accurate copies of the referenced pages from those annual reports are attached hereto as Exhibits C through I.

7. The PLF's first annual report, "Pacific Legal Foundation, The First Report: A Record of Achievement, Winter 1973-74" began with a "Message From the Chairman" on the inside cover which said:

> The Pacific Legal Foundation, a non-profit public interest law firm, was established to correct an imbalance in the presentation of issues in litigation that involves major public policy.
>
> * * *
>
> Although it has been operating less than one year, the Foundation has won several important victories and is involved in scores of legal cases . . . . It is protecting your interests, assisting the courts, and performing a vital public service by presenting "the other side" on issues of major public interest.

8. The chairman's message in that same annual report was followed with a "Statement of Purpose" which said, among other things:

> The Foundation has received wide support . . . . The legal activities of the Foundation will be guided by these principal policies, adopted by the Board of Trustees:
>
> 1. The Foundation shall represent California citizens, individual or corporate, and citizens of the United States, on matters of public interest at all levels of the administrative and judicial process.
>
> 2. The Foundation shall insure that all interests are fully and properly represented in court on issues affecting the public and private sectors.
>
> 4. The Foundation shall not derive any financial benefit from the legal services it provides.
>
> * * *
>
> 10. A Board of Trustees shall be appointed, consisting of not less than 16 nor more than 19 members, of which a majority shall be members in good standing of the State Bar of California.

9. The "Report of the Executive Vice President-Administrator" in the PLF "Third Annual Report, 1975" expressly identified the central nature of litigation:

> Because we recognize that the Foundation's main function is litigation, the vast majority of our funds are directed to legal activities.

10. The PLF's "Fourth Annual Report begins by asserting on page one that "the courtroom" is the PLF's forum:

> Pacific Legal Foundation
> Our client: The taxpayer
> Our Forum: The courtroom
>
> * * *
>
> Reason and responsibility are our arguments. The courtroom is our forum.
>
> * * *
>
> Our purpose is to present to the courts . . . .
>
> * * *
>
> Since its founding in 1973, the Foundation has been actively involved in more than 100 legal proceedings . . . .
>
> * * *
>
> Pacific Legal Foundation is governed by a board of prominent citizens, the majority attorneys . . . .

Ronald Zumbrun's "President Message" on the third page continues the theme, stating among other things:

> During the past fiscal year, the Foundation handled more litigation than the total for its first three years combined.

* * *

> The Foundation will continue to be highly selective in choosing litigation in which to enter.

11. The PLF's "Fifth Annual Report" continued the litigation theme, introducing the PLF on page one with such comments as:

> Since its founding, [PLF] has been actively involved in more than 150 legal proceedings, winning 80 percent of those which have reached final decision.

* * *

> It . . . has litigating offices in Sacramento, California, and Washington, D.C., a liaison office in Seattle, Washington, and a project office in San Diego, California.
>
> The PLF record of legal victories is impressive by any standard -- proof of the impact possible when aggressive, independent and dedicated professionals speak rationally for the broad public interest.

Ronald Zumbrun's "President's Message" on page three continues the litigation law firm theme:

> . . . for Pacific Legal Foundation handled and won more cases than in any past year.

* * *

> As the pioneer of law firms advocating the broad public interest of working men and women in business, agriculture and industry, PLF remains the model to be followed in this field.
>
> * * *
>
> PLF's winning team of attorneys is supported by an exceptional legal and administrative staff . . . backed by an outstanding Board of Trustees.
>
> We select cases which deal with key precedent-setting issues. Every case is a test case.

The same annual report describes PLF activities using such phrases as "PLF successfully defended a lawsuit . . . [p. 9], "Pacific Legal Foundation successfully represented individual employees . . . " [. 11], "[r]epresenting various builders and contractors, PLF challenged a federal law . . . " [id.], and "Pacific Legal Foundation is involved in numerous suits challenging . . . ." [id.].

12. The PLF's "Sixth Annual Report, 1978-1979" introduces the PLF on page one with such comments as:

> PLF brings the viewpoint of this segment of the public before the courts.
>
> In the beginning, PLF's litigation focused on issues that surfaced in the Pacific region.
>
> * * *

Today, PLF litigates from coast to coast . . . .

* * *

PLF litigates in all areas of the public interest . . . .

"A Message from the President and Chairman of the Board" on page three of the same annual report continues with references to "a PLF suit," "[t]he Foundation is litigating," "[t]hree PLF actions," "in two cases before the Ninth Circuit Court of Appeals, PLF argued," "PLF has filed suit," and "PLF has an ambitious litigation program for the coming year." The same annual report contains such references to PLF activities as "PLF represented the supervisors suing HEW . . . " [p. 7] and "PLF is assisting the plaintiff to obtain a rehearing and has been asked to act as co-counsel . . . " [p. 9].

13. The PLF's "Seventh Annual Report, 1979-1980" introduces the PLF on page one by quoting from the "policy concept" adopted by the first Board of Trustees and referring to itself as a "law firm." On page three, "Looking Ahead," signed by Ronald Zumbrun begins: "PLF is a public interest law firm . . . " In the annual report, descriptions of PLF's activities include "[r]epresenting the city of Chula Vista, PLF is also challenging the commission's authority . . . " [p. 8].

14. The PLF's "Eighth Annual Report, 1980-1981" has a "Year in Review" on page one which begins:

> In its eighth year of litigating in the public interest, [PLF] participated in more than 100 cases from coast to coast.

In New York, PLF represented construction workers . . . ."

Other references to PLF activities in the annual report included "[i]n Alaska PLF brought suit . . . ." [p. 1], "[i]n an unrelated action, PLF helped defend . . . ." [id.], "PLF represented San Francisco's controller, who was sued by the city . . . " [id.], a list limited to "only litigation in which PLF actively participated," [p. 4], "PLF has litigated case after case . . . " [p. 8], "PLF agreed to represent them . . . " [id.], "Jacobs . . . asked PLF to represent him" [p. 10], and "PLF represented him and his office in the successful suit argued before the court of appeal" [p. 12].

15. The PLF's "Ninth Annual Report, 1981-1982" contains a list on page three of "litigation in which PLF actively participated in 1981-82" identifying eighty cases. Elsewhere descriptions of the PLF's activities include "[i]n a similar case, PLF represented 13 farmworkers who were fired . . . " [p. 6], "Justice Kaufman asked PLF to represent him" [id.], "[i]n San Francisco, PLF is defending the city controller who is being sued . . . " [id.], and "[r]epresenting the California Grange and individual owners of small farms, PLF has intervened in the case . . . " [id.].

16. These foregoing excerpts reflect the self-described role of the PLF and its relationship to litigation and the to courts during the nine years of PLF activities immediately prior to the filing of this action. The PLF's "Tenth Annual Report", issued during the year in which this action was filed, was reviewed in an earlier declaration, which appears at Tab 8, Exhibit I, Appendix With Selected Materials. On page one, under the heading "The First 10

Years," that PLF annual report contains the already noted, succinct summary statement: "PLF participates in cases nationwide, as plaintiff, as counsel and as 'friend of the court.'"

17. The PLF's annual reports are but one of the PLF publications describing the PLF's litigation activities in this manner. Similar descriptions have continued right through the pendency of BCPUD's sanctions/fees motion. The Autumn 1989 issue of the PLF's In Perspective, page two, contained a "President's Message" by Ronald A. Zumbrun which began as follows:

> There are a number of different ways that the PLF pursues its litigation efforts. We can file a legal action on behalf of a private individual . . ., we can represent a party by intervening in an ongoing lawsuit . . ., or . . . we can file an amicus curiae or "friend of the court" brief.

The President's message, which was entitled "Why Amicus Curiae Briefs are Important," also included the following comments:

> When you think of the many thousands of lawsuits filed each day, . . . you realize that the PLF could not possibly represent parties in all but a small fraction of the cases that could impact on you legal rights.
>
> * * *
>
> We will continue to represent parties in bringing, defending, and intervening in lawsuits.

A true and accurate copy of page two of the Autumn 1989 issue of the PLF's In Perspective is attached as Exhibit K.

18. Both prior to and during the course of the Lockary action, the PLF has also suggested that it has a role in training attorneys. For example, in its "Sixth Annual Report" in "A Message from the President and Chairman of the Board" on page three, the report refers to a fellowship program where law school graduates "will be given training and experience in public interest litigation by PLF staff attorneys." On page eleven of the same report, there is another reference to "education and training under the direct supervision of PLF senior trial attorneys." The report continues: "The purpose of the program is to train the future leaders of the legal profession in the new and expanding field of public interest law." See Exhibit G.

19. In the November 1981 issue of the California Lawyer, roughly one year before this action was filed, the description of the PLF's activities included the following attributed to Robert Best, one of the PLF attorneys in this action:

> Once it enters a case, PLF stays no matter how costly, says Best. "While we rarely get into a war of attrition, government opponents have tried to play that with us. But they've never won. We won't back off. We go an eye for an eye -- it's part of our reputation," he says.

A true and accurate copy of the article from the November 1981 California Lawyer is attached hereto as Exhibit L.

Executed this __ day of July, 1990, in the City and County of San Francisco.

I declare under penalty of perjury that the foregoing is true and correct.

_____

Richard E. V. Harris

APPENDIX R

ENDORSED
FILE
Nov 22 1991
RENE C. DAVIDSON, County Clerk
By: /s/ Lillian C. Don
Lillian C. Don, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CHARLES GILBERT; PHYLLIS GILBERT; MATTHEW LOCKARY; SUSAN IRLAND LOCKARY; and JAMES MACEY,	)
	) No. 636481-0
Petitioners and Plaintiffs,	)
	) STATEMENT
vs.	) OF
	) DECISION

STATE OF CALIFORNIA;)
DEPARTMENT OF)
HEALTH SERVICES;)
KENNETH KIZER, in)
his official capacity as)
Director)
of the Department of)
Health Services;)
BOLINAS COMMUNITY)
PUBLIC UTILITY)
DISTRICT; and)
DOES I through XX,)
)
Respondents and)
Defendants.)
_____)

* * *

Essentially, petitioners attack the validity of the Bolinas moratorium on additional water hookups and the administrative process by which petitioners were denied those hookups.

For the reasons set forth below, the Court is determined to deny both petitions.

* * *

III. IS THERE A WATER SHORTAGE EMERGENCY?

Accordingly, the threshold issue in this case is whether there is, in fact, a water shortage emergency. The resolution of this issue will determine not only the validity of the moratorium itself, but also will facilitate the resolution of petitioners' many other claims which are premised on the

assumption that the water emergency is a sham.

* * *

By way of expert testimony which challenges the factual predicates for the moratorium, petitioners rely almost exclusively on the testimony and declaration of Dietrich Stroeh. Stroeh's analysis is directed at the 1982 engineering report of the Department of Health Services which was prepared by Robert Hultquist. Although the DOHS report was not relied on by the District in determining the propriety of the moratorium, it does shed some light on the continuing validity of the water shortage emergency and, thus, on the continuing validity of the moratorium.

As the District points out, Stroeh's disagreement with the DOHS report is largely philosophical.

* * *

Even to the untutored eye, problems with Stroeh's analysis are apparent. First, as the District points out, Stroeh "ignores the fact that [the District's] summer time use is not limited to water taken from Arroyo Honda. [The District] also takes water from its supply of stored water." Thus, "demand" is substantially understated.

* * *

Second, there is no evidence whatsoever that the years from 1982 to 1986 represent a fair sampling for determining long-range water policy. In fact, several of those years were exceptionally "wet".

Third, the assertion that 39 acre-feet annually is available from Arroyo Honda is without demonstrable

foundation.

In sum, the District had substantial expert evidence available to them upon which to make a reasoned decision to declare a water shortage emergency and to enact and maintain a water hookup moratorium.

* * *

In order to obtain the added benefit of objectivity and the additional confidence that the Court has not been misled by the testimony of an expert possibly more persuasive than correct, the Court appointed a special master in accord with Evidence Code section 730. The task of this court-appointed expert was to evaluate the current conditions of the District's water system and to advise the Court as to whether the current and projected water supply conditions in Bolinas constitute a valid water shortage and, thus, justify the continuance of the moratorium.

* * *

In light of this evidence, the Court finds that there is a solid factual basis for declaring a water shortage emergency and, thus, for imposing a moratorium which precludes potential water users from tapping into the water supply which is both fragile and limited. The Court cannot conclude that the District acted in an arbitrary or capricious manner or that their actions were entirely lacking in evidentiary support.

* * *

In this case, the bottom line is whether there is valid water shortage emergency which justifies the moratorium.

Based upon the Administrative record, it seems

apparent that the moratorium has been justified from its inception to the present based upon realistic concerns about the capacity of the district's water system to meet conservative demands in times of continuing drought, particularly given the marginal capacity not only of the storage system, but the delivery system, as well.

* * *

II. WERE PETITIONERS AFFORDED A FAIR HEARING?

* * *

The Administrative Record reflects the comprehensive presentation permitted petitioners in the pursuit of their petitions before the Board. There are numerous appearances, the submission of hundreds of pages of evidence, the opportunity to respond to the District's evidence, and full unencumbered representation by counsel. Apart from the allegations of "inherent" and "personal" biases, petitioners are bereft of any realistic argument that the hearings were deficient in any way. As noted, petitioners' assertions of bias are without foundation in the record.

* * *

The petitions for peremptory and administrative writs are denied.

Dated: November 22, 1991

/s/_____
Richard A. Hodge,
Judge of the Superior Court

APPENDIX S

FILED
Apr 2 - 1990
RICHARD W. WIEKING
CLERK, U.S. DISTRICT
COURT
NORTHERN DISTRICT
OF CALIFORNIA
SAN JOSE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, et al.,	)	
	)	
	)	
	)	C-82-6191(SW)
Plaintiffs,	)	
	)	ORDER ADOPTING
v.	)	FINDINGS OF
	)	MAGISTRATE BRAZIL
PAUL KAYFETZ, et al.,	)	
Defendants.	)	
_____	)	

I have carefully reviewed the Report and Recommendations by Magistrate Brazil acting as Special master and filed on January 11, 1990, with respect to the liability of plaintiffs' attorneys for sanctions. I have also read and considered the comments on that Report submitted by the parties. I HEREBY ADOPT THE FINDINGS OF

FACT AND CONCLUSIONS OF LAW AND ACCEPT THE RECOMMENDATIONS CONTAINED THE REPORT BY MAGISTRATE BRAZIL. I find that the circumstances of this case clearly support the imposition of substantial monetary sanctions on the Pacific Legal Foundation. In addition, the Magistrate's findings of fact and conclusions of law clearly justify his issuing an order requiring attorneys Darlene Ruiz, Ronald Zumbrun, Harold Hughes, Orrin Finch, and Robert Best, to show cause why they should not be sanctioned in their individual capacities. However, I concur with the comment made by Pacific Legal Foundation in the objection filed January 29, 1990, that Ms. Ruiz may not be held liable for attorneys' fees under Rule 11 for signing the Motion to Strike referred to on page 100 of the Report, because that motion had been signed several months before the effective date of amended Rule 11, and an award of attorneys' fees is not provided for the old Rule 11.

I hereby ORDER Magistrate Brazil to commence further proceedings on the issue of the amount of the sanctions to be imposed on the Pacific Legal Foundation, and on the issue of the liability for the sanctions of the individual attorneys noted in the Report. If the Magistrate concludes that any attorney or attorneys should be sanctioned in their individual capacities, he should also make findings and recommendations with respect to the nature and degree of those sanctions.

IT IS SO ORDERED.

Dated: April 2, 1990

/s/Spencer Williams
UNITED STATES
DISTRICT COURT JUDGE